IN THE SUPREME COURT OF GUAM

GOVERNMENT OF GUAM AND EDNA T. PAULINO,
Plaintiffs-Appellees,

v.

PACIFICARE HEALTH INSURANCE COMPANY
OF MICRONESIA, INC.,
dba PACIFICARE ASIA PACIFIC,
Defendant-Appellant.

OPINION

Filed: September 14, 2004

Cite as: 2004 Guam 17

Supreme Court Case No.: CVA04-006
Superior Court Case No.: CV1426-03

Appeal from the Superior Court of Guam
Argued and submitted on July 16, 2004
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; ROBERT J. TORRES, JR., Associate Justice; PETER C. SIGUENZA, JR., Justice *Pro Tempore*.

**CARBULLIDO, C.J.:**

[1] This appeal concerns the 2003 Group Health Insurance Agreement/Health Services Agreement ("Agreement") executed by the Government of Guam ("Government") and PacifiCare Health Insurance Company of Micronesia, Inc., dba PacifiCare Asia Pacific ("PacifiCare"), for group health insurance coverage for Government of Guam employees, retirees and dependents. A dispute arose between the parties regarding coverage under the Agreement for Fiscal Year 2004 ("FY 2004"), and PacifiCare submitted the dispute to arbitration as required under the Agreement. The three-member arbitration panel issued a unanimous award releasing PacifiCare from any further obligation to provide coverage under the Agreement for FY 2004. Upon motion of the Government, the lower court vacated the arbitrators' award. The lower court found that the arbitrators exceeded their authority in relieving PacifiCare from any further obligations under the Agreement, and further found that the arbitration award was made in disregard of the law and did not draw its essence from the Agreement. PacifiCare appeals the lower court's decision vacating the arbitration award. For the reasons stated herein, we reverse.

## I.

**[2]** In November of 2002, PacifiCare and the Government executed a 2003 Group Health Insurance Agreement/Health Services Agreement. The Agreement was a contract for group health insurance for Government of Guam employees, retirees and dependents for Fiscal Year 2003. The Agreement contained an automatic annual renewal provision and general procedures for setting annual rates. The Agreement also provided that disputes arising under the Agreement were to be submitted to arbitration.

**[3]** During the summer of 2003, the parties engaged in negotiations concerning rates and benefits to be applied to their Agreement for FY 2004. As a result of these negotiations, on August 26, 2003, PacifiCare served a "Notice of Impasse and Demand for Arbitration" ("Demand") upon the Government. The Demand contained four specific enumerated statements of dispute, as follows:

> a. PacifiCare maintains that the Agreement does not permit Defendant to proceed with open enrollment for Fiscal Year 2004 by permitting Government of Guam employees and retirees to select PacifiCare at Fiscal Year 2003 rates and benefits;
>
> b. PacifiCare maintains that under federal law and the Agreement, it is merely required to offer renewal of coverage for Fiscal Year 2004 at rates and benefits that PacifiCare deems appropriate. PacifiCare further maintains that it has fulfilled this obligation by making several offers of renewal and that

PacifiCare's last offer has been expressly rejected by Defendant. As a consequence, PacifiCare has no further obligation to provide any medical or dental coverage for Government of Guam employees and retirees for Fiscal Year 2004; or,

c. In the alternative, if PacifiCare is required to provide any medical or dental coverage to the Government of Guam for Fiscal Year 2004, and PacifiCare does not have the right under federal law or the Agreement to determine the appropriate rates and benefits, then PacifiCare maintains that such rates and benefits must be decided by mutual agreement or binding arbitration; or,

d. In the alternative, if PacifiCare is required to provide any medical or dental services to Government of Guam for Fiscal Year 2004, and the rates and benefits are different than those provided in Fiscal Year 2003, then PacifiCare maintains that the new rates and benefits for Fiscal Year 2004 should be effective as of October 1, 2003.

Appellant's Excerpts of Record ("ER"), vol. I of II, p. 146 (Demand, August 26, 2003).

**[4]** Prior to arbitration, on September 17, 2003, the Government initiated the underlying case in the Superior Court seeking injunctive relief. In its complaint, the

Government sought a temporary restraining order restraining PacifiCare from publishing any further advertisements notifying Government of Guam employees and retirees of its intention to discontinue coverage as of September 30, 2003, and to retract statements to that effect. The Government also sought a preliminary and permanent injunction requiring PacifiCare to continue health insurance coverage pending the outcome of the arbitration proceedings.

**[5]** On September 19, 2003, the Superior Court granted the Government preliminary injunctive relief requiring PacifiCare to continue providing insurance coverage to Government of Guam subscribers until further notice of the court.

**[6]** On September 30, 2003, a one-day arbitration hearing was conducted pursuant to PacifiCare's prior Demand. The parties offered testimony and other evidence. The arbitrators issued a written arbitration award on October 1, 2003. The award provided:

> Pursuant to 1.01.21 of the Arbitration Agreement, the award is hereby rendered.
>
> 1. PacifiCare made offers for renewal of medical coverage for fiscal year 2004 at rates and benefits that PacifiCare deemed appropriate. The Government of Guam did not accept said offers. Under the provisions of the Health Insurance Portability and Accountability Act, 42 U.S.C. 300gg12(a), PacifiCare met its obligations and is under no further obligation to negotiate or to provide any medical health insurance plan to the

Government of Guam for fiscal year 2004.

2. PacifiCare is also relieved of any obligation to renew its contract with the Government under the "continuing clause" in its Agreement with the Government of Guam. Government of Guam v. FHP, Inc., et al., Civ. Nos. CV0809-89, CV0755-89, CV1200-89 and CV1250-89 (Super. Ct. Guam), on Appeal Civ. Nos. 90-00014A, 90-000206A, 90-00040A (D. Guam. App. Div. 1991).

Appellant's Excerpts of Record ("ER"), vol. II of II, p. 393 (Arbitration Award).

**[7]** PacifiCare filed a motion in the Superior Court to confirm the award. The Government thereafter moved to vacate the award.

**[8]** On October 20, 2003 the lower court issued a *Disision Yan Otden* ("Decision and Order") vacating the October 1, 2003 arbitration award. The court found that by relieving PacifiCare from any further obligations under the Agreement, the arbitrators exceeded their authority, and further found that the award was made in disregard of the law and failed to draw its essence from the Agreement. The court remanded the matter to the arbitrators to decide appropriate medical benefits and rates between PacifiCare and the Government for FY 2004. On November 5, 2003, PacifiCare moved for reconsideration of the court's order.

**[9]** On remand, on October 30, 2003, the arbitrators issued a second award. The October 30, 2003 award set rates and

benefits for coverage year FY 2004.[1] PacifiCare thereafter moved to confirm and enforce the October 30, 2003 award, reserving its right to appeal the lower court's October 20, 2003 Decision and Order and to seek damages against the Government for breach of contract. On October 31, 2003, the Superior Court confirmed the October 30, 2003 award in a bench ruling. The parties thereafter proceeded with open enrollment for FY 2004 based upon the rates and benefits set forth in the award issued on remand.

**[10]** PacifiCare thereafter commenced the instant appeal, and moved to expedite the appeal. The Government opposed the motion to expedite and moved to dismiss the appeal. This court denied the Government's motion to dismiss and granted PacifiCare's request that the appeal be expedited. The Government did not file a cross-appeal.

## II.

**[11]** The Federal Arbitration Act ("FAA") applies to arbitration agreements in contracts involving "commerce in the Territories." 9 U.S.C. § 1 (West, WESTLAW through P.L. 108-279) ("['C]ommerce,' as herein defined, means commerce among the several states . . . or in any territory of the United States . . . or between any such Territory and another, or between any such Territory and any State or foreign nation . . . ."). This phrase has been interpreted as encompassing commerce in Guam. *Kanazawa, Ltd. v. Sound, Unlimited*, 440 F.2d 1239, 1240 (9th Cir. 1971) ("The

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[1] The rates were set as follows, subject to a $750 deductible: (1) Medical - $913.70/month for Class I, $2732.34/month for Classes II and III; (2) Dental - $39.42/month for Class I, $105.77/month for Classes II and III. Apparently twelve individuals opted for PacifiCare coverage at these rates.

question presented is whether commerce in Guam is commerce 'in any Territory of the United States' as the phrase is used in 9 U.S.C. § 1. We think it is."). Contracts concerning insurance constitute "commerce" within the scope of the FAA. *See Utica Mut. Ins. Co. v. Gulf Ins. Co.*, 762 N.Y.S.2d 730, 732 (App. Div. 2003) ("Because insurance transactions constitute commerce within the meaning of the Commerce Clause (*see United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533, 553, 64 S. Ct. 1162, 88 L. Ed. 1440, *reh. denied* 323 U.S. 811, 65 S. Ct. 26), it is beyond dispute that the Agreement at issue is a contract involving interstate and, indeed, international commerce."); *Mason v. Acceptance Loan Co., Inc.*, 850 So.2d 289, 294 (Ala. 2002) ("Regarding the application of the FAA in the insurance context, we have held: 'Unquestionably, *insurance transactions that stretch across state lines* or intrastate insurance transactions that otherwise have the requisite (substantial) effect on interstate commerce constitute 'Commerce among the several States,' so as to make them subject to regulation by Congress under the Commerce Clause of the United States Constitution.'") (quoting *Southern United Fire Ins. Co. v. Knight*, 736 So. 2d 582, 586 (Ala. 1999) (citing *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 546-47, 64 S. Ct. 1162 (1944) ("holding that an insurer that conducts business across state lines is engaged in interstate commerce")); *Sotka v. Thrivent Fin. for Lutherans*, 2004 WL 1405741, *1 (Wash. Super. 2004) ("[T]he FAA is applicable in this case, because plaintiff's insurance contract with Thrivent involves interstate commerce.").

**[12]** Accordingly, the FAA applies to the present dispute. *Erickson v. Aetna Health Plan of Cal.*, 84 Cal. Rptr. 2d 76, (Ct. App. 1999) (finding that a breach of a health insurance claim under a contract wherein Aetna would provide replacement Medicare coverage was governed by the FAA

because, among other factors, "Aetna, in performing its Medicare contract, enters into interstate contracts with vendors and service providers operating on a national basis").

**[13]** This court has jurisdiction over the present appeal pursuant to sections 9(a)(1)(D) and (a)(1)(E) of the FAA, which provide:

> (a) An appeal may be taken from--
> (1) an order—
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> ...
>
> (D) confirming or denying confirmation of an award or partial award, or
> (E) modifying, correcting, or vacating an award;
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> . . . .

9 U.S.C. § 16(a)(1)(D)-(E).[2]

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[2] In its Appellee's Brief, the Government raised the defense of sovereign immunity. The Government thereafter conceded the issue during oral argument. Notwithstanding the Government's abandonment of the issue, we nonetheless find the sovereign immunity argument unpersuasive. By entering into an agreement referring disputes to arbitration, the Government is bound by the provisions of such agreement as any other party would, and claim of sovereign immunity is unavailing to prevent enforcement of the agreement. *See Hardie v. United States*, 367 F.3d 1288, 1291 (Fed. Cir. 2004) ("[T]he arbitration clause was part and parcel of the joint venture agreement, and '[a]rbitration agreements are properly viewed as contractual arrangements for resolving disputes.' Consequently, the United States is subject to the arbitration clause of the joint venture agreement just as any private party would be."). This is especially so because the Government not only instituted the underlying action, but sought a temporary restraining order prohibiting PacifiCare from discontinuing coverage to

**[14]** We review a lower court's order vacating an arbitration award *de novo*. *Teamsters Local Union 58 v. Boc Gases*, 249 F.3d 1089, 1093 (9th Cir. 2001); *Brook v. Peak Int'l, Ltd.*, 294 F.3d 668, 672 (5th Cir. 2002). The *de novo* "standard is 'intended to reinforce the strong deference due an arbitrative tribunal.'" *Brook*, 294 F.3d at 672 (quoting *McIlroy v. PaineWebber, Inc.*, 989 F.2d 817, 820 (5th Cir.1993)). The lower court's legal rulings in vacating an arbitration award are reviewed *de novo*, while factual findings are reviewed for clear error. *See Sumitomo Constr. Co. v. Zhong Ye, Inc.*, 1997 Guam 8, ¶ 9.

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Government of Guam employees prior to the resolution of the dispute by the arbitrators. The Government essentially sought performance of the Agreement *pending arbitration*. We are guided by the reasoning articulated by the Fourth Circuit in *United States v. Bankers Ins. Co.*, 245 F.3d 315, 320 (4th Cir. 2001). The Court stated:

> Put simply, the doctrine of sovereign immunity is not in any way implicated or threatened by the Government's compliance with its contract obligations. When the Government chooses to seek damages in a civil action, it—like all parties—should abide by the law, including an arbitration process to which it is contractually bound.

*Id.* Here, the Government itself argued before the lower court that the parties should await the outcome of the arbitration. Considering this, it would be "grossly inequitable" for the Government to use sovereign immunity as a sword to negate the arbitration agreement itself. *Ruppenthal v. State, By and Through Econ. Dev. & Stabilization Bd.*, 849 P.2d 1316, 1321 (Wyo. 1993) ("To permit [a recoupment defense] would seem to be no more than simple justice: to deny it the right would be grossly inequitable. No one would assert that in an action by the sovereign, valid legal defenses should be denied the defendant.") (alteration in original). "To allow a state to enter into a contract and then deny the other contracting party a remedy under the contract would be to 'ascribe bad faith and shoddy dealing to the sovereign.'" *State v. Sorensen*, 436 N.W.2d 358, 364 (Iowa 1989).

## III.

**[15]** PacifiCare argues that the lower court erred in vacating the arbitrators' October 1, 2003 award. In its award, the arbitrators decided that PacifiCare was no longer obligated, under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA")[3] or the "continuing clause" of the parties' Agreement,[4] to renew its contract with

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[3] HIPAA was signed into law on August 21, 1996. Health Ins. Portability and Accountability Act, P.L. No. 104-191, H.R. 3103, 104th Congress (1996). "HIPAA imposes new federal law requirements on health insurers (including indemnity carriers, HMOs and BC/BS organizations) that issue health insurance coverage in either the large group market, the small group market, or both, regarding the issuance and renewal of group health insurance." JEFFREY D. MAMORSKY, HEALTH CARE BENEFITS LAW § 16.03 (2004), found at WESTLAW, HCBL, § 16.03. "The Act is primarily designed to make it easier for those who remain continuously covered under employer-sponsored plans to change jobs without having to satisfy new eligibility requirements," and contains provisions for "guaranteed issue and guaranteed renewability." Phyllis C. Borzi, *Health Care Legislation: Implementing HIPAA, The Newborns' and Mothers' Protection Act, the Mental Health Parity Act, and the Women's Health and Cancer Rights Act*, in American Law Institute-American Bar Association Continuing Legal Education, March 30, 2000, Health Plans, HIPAA, and Cobra Update Current ERISA Tax, and Other Issues for Attorneys, Administrators, Insurers, and Consultants, *available at* WESTLAW, VLR993 ALI-ABA 53, 55.

[4] The so-called continuing clause, Paragraph 2.1 of the Agreement, provided:

> Term. This contract, in its original form, became effective August 1, 1973. It shall renew automatically for one year each October 1st unless terminated for major default in availability or quality of services, given by written notice from the Government of Guam to PacifiCare not less than ninety (90) calendar days before the renewal date, or unless modified by mutual agreement.

Appellant's Excerpts of Record, pp. 172-73, vol. II of II (Agreement, § 2.1).

the Government for FY 2004. The lower court vacated the arbitrators' decision in its October 20, 2003 Decision and Order on three primary grounds: (1) the award exhibited a manifest disregard of the law; (2) the arbitrators' decision did not comport with the essence of the Agreement, namely, the continuing clause; and (3) the arbitrators exceeded their authority by determining to terminate the agreement. For the reasons set forth below, we hold that the lower court erred on all three grounds.

**A. Standards and Grounds for Vacating an Arbitration Award**

**[16]** "In light of the strong federal policy favoring arbitration, '[j]udicial review of an arbitration award is extraordinarily narrow.'" *Brook*, 294 F.3d at 672 (quoting *Gulf Coast Indus. Worker's Union v. Exxon Co.*, 70 F.3d 847, 850 (5th Cir.1995) (alteration in original)); *see Roubik v. Merill Lynch, Pierce, Fenner & Smith*, 692 N.E.2d 1167, 1171 (Ill. 1998) ("It is well established that judicial review of an arbitral award is intended to be more limited than appellate review of a trial court judgment."). In *Sumitomo Construction Co. v. Zhong Ye, Inc.*, 1997 Guam 8, this court stated that "[w]hen reviewing the decision of a lower court confirming an arbitration award, questions of law are reviewed de novo while questions of fact are reviewed under the clearly erroneous standard." *Id.* at ¶ 9 (citing First Option of Chicago, Inc., v. Kaplan, 514 U.S. 938 (1995)). The *Sumitomo* court further held that "[t]hese same standards apply to the trial court's review of the arbitrator's award." *Id.* (citing Carpenters Pension Trust v. Underground Construction Co., 31 F.3d 776 (9th Cir. 1994)). This latter pronouncement relates to the question of the standards applicable to the lower court in reviewing the arbitrators' award. We do not interpret this pronouncement in *Sumitomo* as indicating that arbitration awards may be reviewed freely

under the *de novo* and clearly erroneous standards without regard to the well-established policy considerations favoring arbitration. *See Automated Tracking Sys., Inc. v. Great Am. Ins. Co.*, 719 N.E.2d 1036, 1041 n.2 (Ohio Ct. App. 1998). With regard to the standards applicable in determining whether to vacate an arbitration award, the *Sumitomo* court further clarified:

> In arbitration cases decided under the [FAA] . . . the scope of review is quite narrow. This is complementary to a policy favoring consensual agreements and guaranteeing enforcement of contractual terms between the parties. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985). Although a serious question may arise as to the arbitrator's view of the law, an award "will not be set aside by a court for error either in law or fact ... if the award contains the honest decision of the arbitrators, after a full and fair hearing of the parties." *Coast Trading Co., Inc. v. Pacific Molasses Co.*, 681 F.2d 1195, 1198 (9th Cir. 1982) (citations omitted). In other words, "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, a court's conviction that the arbitrator made a serious mistake or committed grievous error will not furnish a satisfactory basis for undoing the decision." *Advest, Inc. v. McCarthy*, 914 F.2d 6, 9 (1st Cir. 1990) (citations omitted).

Sumitomo Constr. Co., 1997 Guam 8 at ¶ 10. Thus, while as a general matter legal determinations are reviewed *de novo* and factual determinations are reviewed for clear error, an

application of these general standards of review does not support vacating an arbitrator's decision absent the recognized narrow circumstances warranting vacatur. *See Automated Tracking Sys., Inc.*, 719 N.E.2d at 1041 n.2 ("While we will review the trial court's order vacating the arbitrators' award *de novo*, . . . we decline to review the arbitrators' award itself *de novo*."); *Local Joint Executive Bd. of Las Vegas v. Riverboat Casino, Inc.*, 817 F.2d 524, 526 (9th Cir. 1987) ("This court reviews *de novo* the district courts grant of summary judgment confirming the arbitration award. The district court's review of the arbitral award is, however, limited.") (citation omitted).

**17]** Section 10 of the FAA enumerates the grounds wherein a court may vacate an arbitration award. It provides:

> **(a)** In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration-
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> **(1)** where the award was procured by corruption, fraud, or undue means;
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> **(2)** where there was evident partiality or corruption in the arbitrators, or either of them;
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> **(3)** where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other

> misbehavior by which the rights of any party have been prejudiced; or
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> **(4)** where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. . . .

9 U.S.C. § 10 (West, WESTLAW through P.L. 108-279).[5]

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[5] In its October 20, 2003 Decision, the lower court relief upon Guam's Civil Arbitration Law, including section 42108 of Title 7 of the GCA, in determining whether to vacate the arbitrator's award. The lower court did not cite or rely upon section 10(a) of the FAA. Section 42108 of Title 7 of the GCA, Guam's Civil Arbitration Law, which governed the standard for vacating an arbitration award at the time of the lower court's October 20, 2003 Decision, mirrors exactly section 10 of the FAA. *See* Title 7 GCA § 42108 (1993). This court has recognized, in *Sumitomo,* that section 42108 was patterned after the United States Arbitration Act, which is the predecessor statute of the FAA. *See Sumitomo Constr. Co.,* 1997 Guam 8 at ¶ 5 ("A review of the legislative drafts concerning Guam's arbitration statutes indicates that they were patterned after the United States Arbitration Act found in Title 9 of the United States Code Annotated. §§ 1-14 (1970) . . . . In particular, the Guam provisions addressing vacation of arbitration awards mirror exactly the corresponding federal statutes."). In *Sumitomo,* we further found that because the Legislature modeled our statute after the federal statute, "[w]e can properly assume that the legislature meant to adopt the federal construction of Guam's arbitration statutes. . . ." *Id.* At ¶ 8.

Our statute was patterned after section 10 of the FAA, therefore, federal cases interpreting the FAA are persuasive on this court's construction of section 42108. *Id.* The FAA applies in the present dispute. Because we interpret the local statute, section 42108 of Title 7 of the GCA, in the same a manner as our interpretation of section 10 of the FAA, the lower court's decision made pursuant to section 42108 will be reviewed as having been made pursuant to section 10 of the FAA. *See Volt Info. Sciences, Inc. v. Bd. Of Trustees of Leland Stanford Jr. Univ.,* 489 U.S. 468, 477, 109 S. Ct. 1248, 1255 (1989) (recognizing it prior

**[18]** In addition to the grounds set forth in the FAA, there exist several judicially-created grounds for vacating an award. *See* Sumitomo Constr. Co., 1997 Guam 8 at ¶ 19 (recognizing that courts have vacated arbitration awards based on a "manifest disregard of the law" which is "not statutory but rather a judicially recognized federal exception introduced by the United States Supreme Court in *Wilko v. Swan*, 346 U.S. 427, 436-37, 74 S. Ct. 182, 98 L. Ed. 168 (1953), *overruled on other grounds by Rodriguez De Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989)"); *Sheldon v. Vermonty*, 269 F.3d 1202, 1206 (10th Cir. 2001) (stating that in addition to the circumstances enumerated under section 10 of the FAA, "[w]e have also recognized 'a handful of judicially created reasons' that a district may rely upon to vacate an arbitration award . . . ."). The commonly recognized non-statutory grounds include "[1] a 'manifest disregard' of the law by the arbitrator, [2] a conflict between the award and a clear and well established 'public policy,' [3] an award that is 'arbitrary and capricious' or 'completely irrational,' and [4] a failure of the award to 'draw its essence' from the parties' contract." Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 739 (Spring 1996) (describing the aforementioned as

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holding that the substantive provisions of the FAA apply in both state and federal courts); *Dakota Weslevan Univ. v. HPG Int'l, Inc.*, 560 N.W.2d 921, 922 (S.D. 1997) (holding that the FAA "preempts state law and governs all written arbitration agreements in contracts involving interstate commerce."); *Safeway Stores, Inc. v. Brotherhood of Teamsters*, 83 Cal.App.3d 430, 436, 147 Cal. Rptr. 835, 838 (Cal. Ct. App. 1978) (applying federal law after "[r]ecognizing California's arbitration statutes (Code Civ.Proc., s 1280 et seq.), *especially those governing the scope of judicial review of an arbitrator's award and the grounds for vacation of an award* (Code Civ.Proc., s 1286.2), having 'considerable substantive as well as procedural significance'") (emphasis added). We thus rely on authority interpreting and applying section 10 of the FAA in reviewing whether the lower court correctly vacated the arbitrators' award.

the "primary . . . nonstatutory grounds") (footnotes omitted); *see also Sheldon*, 269 F.3d at 1206 (stating that some recognized exceptions that a district court may rely upon "include violations of public policy, manifest disregard of the law, and denial of a fundamentally fair hearing."); *Greenberg v. Bear, Stearns & Co.*, 220 F.3d 22, 27 (2d Cir. 2000) (recognizing that in addition to the grounds set forth in section 10(a) of the FAA, "judicial interpretation has added additional grounds, such that awards may be vacated under limited circumstances where the arbitrators manifestly disregarded the law or where enforcement would violate a 'well defined and dominant public policy'") (citation omitted).

**[19]** Federal courts have not ruled consistently on whether an arbitration award may be vacated for reasons other than those set forth under section 10 of the FAA. Hayford, *supra*, at 746 ("There is substantial disagreement among the United States circuit courts of appeals as to whether the statutory grounds for vacatur set out in Section 10(a) of the FAA should be augmented by judicially fashioned standards for review.")[6]; *see also George Watts & Son, Inc. v. Tiffany and*

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[6] The author summarized the state of the law on this issue as follows:

> Only the Fourth Circuit has unequivocally rejected the nonstatutory grounds for vacatur.
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> ...
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> Four circuit courts of appeals can be described as being in a state of extreme confusion with regard to the non-statutory grounds for vacatur: the Sixth, Ninth, Fifth, and Seventh. The case law in each of those four circuits contains one or more unequivocal assertions that the exclusive grounds for vacatur of commercial arbitration awards are those set forth in section 10(a) of the FAA, juxtaposed with one or more opinions recognizing and applying a non-statutory ground for vacatur.
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> ...
>
> [T]he remaining federal circuit courts of appeals—the First, Second, Third, Eighth, Tenth, Eleventh, and District of Columbia Circuits—have clearly recognized one or more of the nonstatutory

*Co.*, 248 F.3d 577, 579-580 (7th Cir. 2001) (explaining that the law in the Seventh Circuit and "in other circuits is similarly confused" in whether the manifest disregard of the law standard is an independent reason to set aside an arbitration award). This court has never squarely decided whether the grounds set forth in section 10 are the exclusive grounds for vacating an arbitration award. *Cf.* Sumitomo Constr. Co., 1997 Guam 8 at ¶ 20 (leaving open the question of whether the "manifest disregard for the law" applied as an exception to the grounds set forth in the Commercial Arbitration Law, Section 42107 of Title 7 of the GCA, and finding that while legal authority existed to enable the court to adopt the exception in this jurisdiction, "at this time we are not presented with the proper justification necessitating our adoption and use of the manifest disregard exception.").

**[20]** The lower court relied upon both statutory and non-statutory grounds in vacating the arbitrators' award. We therefore review the court's reliance on both categories of grounds. A discussion of all three specific grounds relied upon by the lower court is presented below in relation to the relevant issues in this appeal.

### B. The Lower Court's Decision

#### 1. Arbitrability of the termination issue

**[21]** In its October 20, 2003 Decision and Order, the lower court found that the arbitrators exceeded their authority by addressing the issue of termination. ER, vol. II of II, p. 426

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grounds for vacatur of commercial arbitration awards, without having embraced in another opinion (earlier or later) the "exclusivity" view of Setion 10(a) of the FAA. Thus, they can be placed in the "nonstatutory grounds" category.

Hayford, *supra*, at 764-65, 774 (footnotes omitted).

(Decision and Order, October 20, 2003, p. 26). The lower court cited Enclosure 9A of the administrative procedures governing the negotiations for FY 2004, which provided that "[a] request for arbitration shall be confined to those issues to which resolutions was earnestly sought at the negotiating table but was not reached." ER, vol. II of II, p. 417 (Decision and Order, p. 17, October 20, 2003) (quoting Enclosure 9A, ¶ I(4)). The court stated that "[b]ased upon Enclosure 9A, the arbitrators were bound to decide the only issue which resulted in an impasse, i.e., medical coverage." ER, vol. II of II, p. 426 (Decision and Order, October 20, 2003, p. 26). The court concluded that the arbitrators exceeded their authority by concluding that PacifiCare was no longer required to provide medical or dental coverage under its Agreement with the Government of Guam because the "award must be limited to issues which created an impasse and not others." ER, vol. II of II, p. 426 (Decision and Order, October 20, 2003, p. 26).

**[22]** By determining that the arbitrators' authority was limited by the procedural requirements of Enclosure 9A, the lower court's decision implicated the issue of arbitrability. The lower court essentially determined that the issues of continued coverage or termination were not arbitrable.

**[23]** Under section 10(a)(4) of the FAA, a lower court may vacate an arbitration award when the arbitrators exceed their authority. 9 U.S.C. § 10(a)(4). An arbitrator exceeds his authority when he "arbitrate[s] a dispute that is not arbitrable in the first place." *State v. R.I. Alliance of Soc. Servs. Employees, Local 580, SEIU*, 747 A.2d 465, 468 (R.I. 2000).

**[24]** "It is a long-standing principle of consensual arbitration that the nature and scope of an arbitration panel's authority is determined by the language of the arbitration clause." *Lupone v. Lupone*, 848 A.2d 539, 541 (Conn. Ct.

App. 2004); *see also Kiefer Specialty Flooring, Inc. v. Tarkett, Inc.*, 174 F.3d 907, 909 (7th Cir. 1999) ("Whether a particular issue is subject to arbitration is a matter of contract interpretation, because 'a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'") (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S. Ct. 1347 (1960)). Thus, "[t]he contours of the arbitrator's powers are determined by reference to the parties' agreement to arbitrate and their submission to arbitration. They are not ascertained by judicial determinations of the types and degrees of error (law, fact, or contract interpretation) that will be, or rightfully should be, tolerated without voiding the award." Hayford, *supra*, at 825; *see also Moncharsh v. Heily & Blase*, 832 P.2d 899, 916 (Cal. 1992) ("It is well settled that 'arbitrators do not exceed their powers merely because they assign an erroneous reason for their decision.' A contrary holding would permit the exception to swallow the rule of limited judicial review; a litigant could always contend the arbitrator erred and thus exceeded his powers.") (citation omitted).

**[25]** The lower court reviewed the issue of arbitrability independently and determined that the arbitrators were not permitted under the Agreement to determine the issue of continued coverage. We find that the lower court erred in this regard. In reviewing the lower court's decision, we are required to distinguish between issues reserved for determination by the courts and those reserved for the arbitrators.

**[26]** The United States Supreme Court has clarified, "[w]hen deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." *First Options of Chicago, Inc. v.*

*Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 1924 (1995). However, several presumptions apply when interpreting a contract containing an agreement to arbitrate. First, "strong support for the federal policy favoring arbitration exists[,]" and "the FAA 'establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'" *Kiefer Specialty Flooring, Inc.*, 174 F.3d at 909 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S. Ct. 927 (1983)); *see also Sumitomo Constr. Co.*, 1997 Guam 8 at ¶ 14 ("[A]ny doubt as to the arbitrator's jurisdiction is resolved in favor of arbitration."). Stated another way, ambiguities regarding the question of "*whether* a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement" are construed in favor of arbitration. *See First Options*, 514 U.S. at 944-45, 115 S. Ct. at 1924 (determining that before concluding that the parties intended that an issue not be arbitrated, the intent to exclude such issues from arbitration must be clear); *see also United States v. Bankers Ins. Co.*, 245 F.3d 315, 319 (4th Cir. 2001) ("[I]n applying common law principles of contract interpretation to the interpretation of an arbitration agreement within the scope of the FAA, due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration.") (brackets omitted) (quoting *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 475-76, 109 S. Ct. 1248 (1989)); *Executone Info. Sys., Inc. v. Davis*, 26 F.3d 1314, 1320-21 (5th Cir. 1994) ("In deciding whether the arbitrator exceeded its authority, we resolve all doubts in favor of arbitration."); *Roubik*, 692 N.E.2d at 1172 ("[I]n reviewing an arbitrability question, courts are bound to apply the established federal policy favoring arbitration and to resolve any doubts concerning the scope of arbitrable issues in favor of arbitration."); *Kiefer Specialty Flooring, Inc.*, 174

F.3d at 909 ("[A] court may not deny a party's request to arbitrate an issue 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'") (quoting *United States Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83, 80 S. Ct. 1347 (1960)).

**[27]** Second, on the question of *who* determines arbitrability, the law "reverses the presumption" favoring arbitrability. *First Options*, 514 U.S. at 945, 115 S. Ct. at 1924. The question of whether a claim or dispute is arbitrable is generally considered one for the courts, and not the arbitrators, unless the parties clearly and unmistakably reserved the question for the arbitrators. *See id.* (explaining that in deciding "whether a party has agreed that arbitrators should decide arbitrability," "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable' evidence that they did so.") (brackets omitted); *see also Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S. Ct. 588, 592 (2002). Courts may conduct an independent determination of the question of arbitrability if the parties have not clearly agreed that the question of arbitrability is to be determined by the arbitrator. *See Roubik*, 692 N.E.2d at 1172 ("Under the FAA and the case law interpreting it, the question of whether a claim is arbitrable is to be independently decided by the courts, unless the parties 'clearly and unmistakably' agree to allow the arbitrator to decide arbitrability.") (alteration omitted).

**[28]** Any "potentially dispositive" inquiry related to whether a requirement for arbitration has been fulfilled could be considered, "linguistically speaking," a "'question of arbitrability'," to the extent that "its answer will determine whether arbitration will proceed on the merits." *Howsam*, 537 U.S. at 83, 123 S. Ct. at 592. However, the clear and

unmistakable standard applies only to determining who decides certain questions of arbitrability, including "whether the parties are bound by a given arbitration clause," and "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy." *Id.*, 537 U.S. at 84, 123 S. Ct. at 592.

**[29]** By contrast, "'procedural' questions which grow out of the dispute and bear on its final disposition' are presumptively *not* for the judge, but for an arbitrator, to decide." *Id.* (quoting *John Wiley & Sons Inc. v. Livingston*, 376 U.S. 543, 557, 84 S. Ct. 909 (1964)). Citing comments to the Revised Uniform Arbitration Act, the Court in *Howsam* recently clarified that "in the absence of an agreement to the contrary, issues of substantive arbitrability . . . are for a court to decide and issues of procedural arbitrability, *i.e.*, whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide." *Id.* 537 U.S. at 85, 123 S. Ct. 588 at 592 (emphasis omitted).

**[30]** Thus, unlike questions of substantive arbitrability, which may be reviewed by courts independently absent a clear and unmistakable intent by the parties otherwise, courts apply a deferential standard to an arbitrator's decision on issues related to procedural requirements for arbitrability. *See Kennecott Utah Copper Corp. v. Becker*, 186 F.3d 1261, 1267-68 (10th Cir. 1999). Specifically, "if a party submits a question of procedural arbitrability to an arbitrator, a court will not later review the issue *de novo*, but will instead defer to the arbitrator's resolution in the same way it defers to his or her ruling on the merits." *Id.* at 1267 (citing the holding of *First Options*' that if the parties agreed to submit the arbitrability question to arbitration, "then the court's standard for reviewing the arbitrator's decision about that matter

should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate."). "This rule of deference is founded on the recognition that '(1) procedural questions are often intertwined with the merits of the dispute and (2) the reservation of procedural issues for the courts provides an opportunity for serious delay and duplication of effort." *Stroh Container Co. v. Delphi Indust., Inc.*, 783 F.2d 743, 748-49 (8th Cir. 1986).

**[31]** The lower court here conducted an independent review of the whether the arbitrators could decide the question of termination, giving no deference to the arbitrators' decision. We review *de novo* "whether the issue of arbitrability is for the court or for the arbitrator." *Bell v. Cendant Corp.*, 293 F.3d 563, 565-66 (2d Cir. 2002). We find that the lower court erred in determining arbitrability independently of the arbitrators' decision.

**[32]** In *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 84 S. Ct. 909 (1964), the Supreme Court faced the issue of whether the court or the arbitrator should decide the question of whether the dispute resolution requirements and procedures in the parties' contract were met. In *John Wiley*, two companies, John Wiley and Interstate, merged. *Id.*, 376 U.S. at 544-45, 84 S. Ct. at 912. Prior to the merger, many of Interstate's employees were members of a union and received the benefits of a collective bargaining agreement ("CBA"). *Id.* A dispute arose between the union and John Wiley as to whether the collective bargaining agreement survived the merger. *Id.* John Wiley argued that it did not, while the union argued that the employees had vested rights under the CBA notwithstanding the merger. *Id.* Prior to the expiration of the agreement, the union commenced an action in court to compel arbitration. *Id.* The Supreme Court was presented with two issues: (1) who should decide whether the

arbitration provisions in the CBA survived the merger; and (2) who should decide whether certain grievance procedures required prior to commencing arbitration have been met. *Id.*, 376 U.S. at 544, 84 S. Ct. at 911. The Court held that the first question, which was related to whether the parties were "bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties." *Id.*, 376 U.S. at 547, 84 S. Ct. at 913. On the second issue, however, the Court found the opposite - that the arbitrators should decide the issue.

**[33]** Specifically, in *John Wiley*, the CBA enumerated a three-step process for determining disputes. Step 1 required a conference between the employee, union steward, and employer. *Id.*, 376 U.S. at 555-56, 84 S. Ct. at 917. Under Step 2, the grievance was to be submitted to an officer of the employer and a union shop committee, and/or a representative from the union. *Id.*, 376 U.S. at 556, 84 S. Ct. at 917. Under Step 3, the parties would arbitrate the dispute "in the event that the grievance should not be resolved or settled in Step 2." *Id.*, 376 U.S. at 556, 84 S. Ct. at 917. On appeal, John Wiley argued that since the first two steps were not followed, "it has no duty to arbitrate this dispute." *Id.* John Wiley further argued that "whether 'procedural' conditions to arbitration have been met must be decided by the court and not the arbitrator." *Id.*, 376 U.S. at 556, 84 S. Ct. at 918. The Supreme Court disagreed, finding that the issues regarding compliance with the grievance procedures were intertwined with the merits because the procedural prerequisites "develop in the context of an actual dispute about the [r]ights of the parties to the contract or those covered by it." *Id.*, 376 U.S. at 556-57, 84 S. Ct. at 918. The Court explained:

> Doubt whether grievance procedures or some part of them apply to a particular dispute,

> whether such procedures have been followed or excused, or whether the unexcused failure to follow them avoids the duty to arbitrate cannot ordinarily be answered without consideration of the merits of the dispute which is presented for arbitration. . . . It would be a curious rule which required that intertwined issues of 'substance' and 'procedure' growing out of a single dispute and raising the same questions on the same facts had to be carved up between two different forums, one deciding after the other. Neither logic nor considerations of policy compel such a result.

*Id.*, 376 U.S. at 557, 84 S. Ct. at 918. The Court held: "Once it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." *Id.*

**[34]** In the case *sub judice*, the lower court identified the subject matter of the dispute as involving PacifiCare's continued obligation to provide coverage for FY 2004. The parties' Agreement broadly provided: "*Any dispute or controversy* between the parties arising under this Agreement shall be submitted to binding arbitration." Appellant's ER, vol. II of II, p. 217 (Agreement, Attachment III, § 1.01). In light of this broad language, a dispute concerning whether PacifiCare could be released from its obligations was a subject matter which was arbitrable under the parties' Agreement. Furthermore, there is nothing in the Agreement which excluded the issue of termination from resolution pursuant to the arbitration clause.

**[35]** Thus, "[o]nce it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." *John Wiley*, 376 U.S. at 557, 84 S. Ct. at 918.

**[36]** Here, the lower court cited Enclosure 9A(I)(4) which provided that "[a] request for arbitration shall be confined to those issues to which resolutions was earnestly sought at the negotiating table but was not reached." Supplemental Record on Appeal, (Decl. of David A. Mair, Ex. A). The lower court apparently interpreted the language as a limitation to the arbitrators' powers, specifically, that the arbitrators were only authorized to decide issues which the parties were at an impasse. The lower court's decision was grounded in its determination that the parties had not reached an impasse on the issue of termination. Similar to *John Wiley*, this question of whether the dispute resolution requirements and procedures were met was one for the arbitrators. *See John Wiley*, 376 U.S. at 557, 84 S. Ct. at 918 (holding that the arbitrators, and not the court, should decide the issue of whether the parties complied the grievance procedures which were prerequisites for arbitration). Questions of whether the parties negotiated and reached an impasse on an issue submitted for decision by the arbitrators necessarily "develop in the context of an actual dispute about the [r]ights of the parties to the contract or those covered by it." *Id.*, 376 U.S. at 556-57, 84 S. Ct. at 918.

**[37]** Furthermore, our characterization of the issue here as falling within the realm of procedural arbitrability is supported by the rationale for the respective presumptions applicable when interpreting an arbitration agreement. As the Supreme Court has explained, the question of ***whether*** a merits-related dispute is arbitrable

> arises when the parties have a contract that provides for arbitration of some issues. In such circumstances, the parties likely gave at least some thought to the scope of arbitration. And, given the law's permissive policies in respect to arbitration, one can understand why the law would insist upon clarity before concluding that the parties did *not* want to arbitrate a related matter. On the other hand, the former question - the "who (primarily) should decide arbitrability" question-is rather arcane. A party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers. And, given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the "who should decide arbitrability" point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.

*First Options*, 514 U.S. at 945, 115 S. Ct. at 1924-25 (citations omitted). Thus, as the Court in *First Options* explained, where the question is who decides arbitrability, it is possible that the parties did not think the arbitrator would decide the question. *Id.* This is because by including an arbitration clause, the parties were likely only contemplating that the issues before the arbitrator would relate to the merits of the dispute brought *pursuant to the arbitration clause*, and not whether a dispute fell within the clause to begin with. Such reasoning is sensible where the precise question is who

decides substantive questions of arbitrability, such as whether the subject matter of the dispute falls within the arbitration clause. By contrast, here, the provisions identified by the lower court are the procedures of Enclosure 9A. By including a broad arbitration clause in the Agreement mandating arbitration of "any dispute or controversy arising under the Agreement," and by making the requirements of Enclosure 9A part of the negotiation process under the Agreement, the parties would "likely expect that an arbitrator would decide the gateway matter" of whether the *otherwise arbitrable subject* could be addressed in light of the procedural requirements of Enclosure 9A. *Howsam*, 537 U.S. at 84, 123 S. Ct. at 592; *cf. Abram Landau Real Estate v. Benova*, 123 F.3d 69, 74 (2d Cir. 1997) (finding that the arbitrator, and not the courts, should determine whether arbitration was barred by the evergreen clause in the parties' contract, and concluding that because the agreement "contained a broad arbitration clause submitting to arbitration *all* disputes between the parties *involving* the interpretation of any provision of the Agreement[, the] provision surely cover[ed] a dispute involving the validity of the 'evergreen clause' and, therefore, is a proper subject for arbitration").[7]

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[7] We note the cases of *HIM Portland, LLC v. Devito Builders, Inc.*, 317 F.3d 41 (1st Cir. 2003), and *White v. Kampner*, 641 A.2d 1381 (Conn. 1994), but determined that they do not compel us to reach a contrary conclusion. In *HIM*, the First Circuit affirmed the district court's decision denying a motion to compel arbitration where the parties did not first request mediation as required under the contract. *HIM*, 317 F.3d at 44. Notably, the *HIM* court did not address the issue of whether the court or the arbitrators should decide whether a condition precedent to arbitration was satisfied. We thus do not find the case instructive. In *White*, the Connecticut Supreme Court affirmed the trial court's decision that the mandatory negotiation clause in the parties' agreement was a condition precedent to arbitration, and that "this arbitrability issue was one for the courts to determine, not the arbitrators." *White*, 641 A.2d at 1385. We find *White* distinguishable because there, the parties' contract

**[38]** Thus, while it was within the lower court's province to review whether the arbitrators exceeded their authority, in conducting this review, the lower court should have given the appropriate deference to the arbitrators' decision on the issue regarding compliance with the procedural prerequisites for arbitration of a particular issue. *See Major League Umpires Ass'n v. American League of Professional Baseball Clubs*, 357 F.3d 272, 279 (3d Cir. 2004).[8]

**[39]** By releasing PacifiCare from any further obligation under the Agreement, the arbitrators presumably and implicitly found that the procedural requirements for determining the issue, including the requirement of an impasse, were met. Given the deferential standard of review of the arbitrators' decisions, we cannot conclude that the arbitrators' decision to consider and decide the issue of termination contained a defect which would warrant setting that decision aside under any of the limited grounds for vacating an arbitration award. In fact, there is evidence in the record which supports the arbitrators' decision. In its Demand, PacifiCare indicated that the parties were at an impasse as to medical rates, and requested that it be released from any further obligation under the Agreement. In its arbitration brief, PacifiCare further elaborated that prior to

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did not contain a broad and unlimited arbitration clause; rather, the arbitration provision in the parties' contract contained the qualification that negotiation be conducted as a condition of arbitrability. *See id.* At 1385 n.10. Moreover, assuming the *White* case is not limited to its facts, we are not otherwise persuaded by the court's holding to the extent that it conflicts with our reasoning set forth in the body of this opinion.

[8] The requirements set forth in Enclosure 9A regarding negotiation do not affect our decision that procedural arbitrability questions are for the arbitrators. A reading of Enclosure 9A reveals that the procedures set forth therein are related solely to issues raised during negotiations for coverage for FY 2004, and not other issues, such as questions of arbitrability, which may arise under the agreement.

arbitration, the parties discussed the issue of continued coverage for FY 2004. There is nothing in the record that would support overturning the arbitrators' decision under either section 10 of the FAA, or any judicially-recognized ground for vacating an arbitration award. *See Hill v. Norfolk & W. Ry. Co.*, 814 F.2d 1192, 1195 (7th Cir. 1987) (stating that an arbitration award may only be set aside in the limited circumstances where the arbitrators "don't interpret the contract" or if their decision "is infected by fraud or other corruption"). Accordingly, the lower court's contrary independent finding was in error.

**[40]** The dissent argues that the lower court's decision under section 10(a)(4) should be affirmed on other grounds. Specifically, the dissent contends that other terms of the parties' Agreement revealed an intent that the issue of termination was not within the arbitrators' authority to decide. We disagree.

**[41]** The dissent first contends that several provisions of the Agreement limit the scope of the arbitration clause, including the provisions which instruct that arbitrators may only decide issues identified in the arbitration notice and which bind the arbitrators to the Agreement. The dissent further identifies provisions of the Agreement which restrict issues in litigation to those not submitted to arbitration, and which clarifies that the arbitration procedures in the Agreement do not change the effect of the Appellate Division case *Government of Guam v. FHP, Inc.* (Civil Case No. 90-00014A). These provisions of the Agreement do not limit the scope or subject matters cognizable under the arbitration clause. Furthermore, the provisions identified by the dissent are not relevant here. The circumstances covered by the aforementioned provisions are not present in the case *sub judice*.

**[42]** The dissent also identifies the automatic renewal clause as affecting the outcome of this case. Paragraph 2.1 of the Agreement provided:

> Term. This contract, in its original form, became effective August 1, 1973. It shall renew automatically for one year each October 1st unless terminated for major default in availability or quality of services, given by written notice from the Government of Guam to PacifiCare not less than ninety (90) calendar days from the renewal date, or unless modified by mutual agreement.

Appellant's ER, p. 172, vol. II of II (Agreement, ¶2.1).[9]

**[43]** We do not find the automatic renewal provision to render the question of termination non-arbitrable. The automatic renewal provision evidences an intent that

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[9] Similar provisions requiring continued coverage are set forth by statute. *See* Title 4 GCA §4301(g)(1996); 42 U.S.C. §300gg-12(a). Title 4 GCA §4301(g) states that the Governor shall:

> incorporate the continuing provision clause made available to [GMHP], FHP, Inc. and Staywell, which was the subject of the District Court of Guam Appellate Division Case *Government of Guam v. FHP, Inc.*, (D.Guam App. Div. 1991), in the government's group health insurance agreement with any health insurance company . . . which has contracted with the government of Guam for at least two (2) consecutive years.

4 GCA §4301(g)(1996). Title 42 U.S.C. §300gg-12(a) of HIPAA provides:

> Except as provided in this section, if a health insurance issuer offers health insurance coverage in the small or large group market in connection with a group health plan, the issuer must renew or continue in force such coverage at the option of the plan sponsor of the plan.

42 U.S.C. §300gg-12(a).

coverage be renewed automatically. It does not evidence an intent that the Agreement could never be terminated, or that a dispute as to whether termination is warranted is not arbitrable. Furthermore, the fact that the Agreement enumerates specific circumstances where termination is allowed does not alter our conclusion that the issue of termination was within the arbitrators' authority to decide. The circumstances enumerated in the Agreement warranting a termination of coverage does not reveal an intent that only those circumstances be submitted for determination by the arbitrators. The question of whether PacifiCare was obligated to continue coverage, or could terminate coverage, was a subject matter which could be considered by the arbitrators *specifically because* termination was permitted under the Agreement and law applicable to the Agreement. Whether or not termination was warranted under the facts viewed against the Agreement and relevant statutes goes to the merits of the dispute - a question explicitly reserved for the arbitrators in light of the parties' broad arbitration clause. It would be incongruous to conclude that by specifying instances where termination would be allowed, the parties necessarily intended to exclude from arbitration questions of termination which were not specified in the Agreement but otherwise arose out of the contract. The parties cannot be expected to anticipate every possible issue or dispute that could arise, or every possible remedy for a dispute. In determining the parties' intent regarding the matters to be arbitrated, it suffices to view the arbitration clause and any other provision in the contract which explicitly excludes certain subjects from arbitration. Here, the arbitration clause required that "*Any dispute or controversy* between the parties arising under this Agreement shall be submitted to binding arbitration." Appellant's ER, vol. II of II, p. 217 (Agreement, Attachment III, § 1.01). The Agreement contains no limitation on the subject matters which may be submitted to arbitration. The parties' intent could not be clearer. The

question of termination where the parties could not agree as to rates arose out of the Agreement. Therefore, the question was within the arbitrators' authority to decide.

### 2. Non-Statutory Grounds

**[44]** We next consider whether the lower court erred in vacating the arbitrators' award based on other grounds. The lower court found that the arbitrators erred as a matter of law in concluding that PacifiCare was not obligated to provide coverage for FY 2004 under either HIPAA or the Agreement. ER, vol. II of II, pp. 423-24 (Decision and Order, October 20, 2003, pp. 23-24). The lower court concluded that such legal error supported vacating the arbitrators' award on the ground that it was made in manifest disregard of the law, and was contrary to the essence of the parties' Agreement. We disagree.

#### a. Manifest Disregard of the Law

**[45]** This court in *Sumitomo Constr. Co. v. Zhong Ye Inc.*, recognized that courts have vacated arbitration awards based on a "manifest disregard of the law," which is "not statutory but rather a judicially recognized federal exception introduced by the United States Supreme Court in *Wilko v. Swan*, 346 U.S. 427, 436-37 . . . (1953)." *Sumitomo Constr. Co.*, 1997 Guam 8 at ¶ 19 (quoting *Todd Shipyards Corp. v. Cunard Line Ltd.*, 943 F.2d 1056 (9th Cir. 1991)). In fact, it has been recognized that "[m]anifest disregard of the law is the seminal non[-]statutory ground for vacatur of commercial arbitration awards." Hayford, *supra*, at 774.

**[46]** As recognized in *Sumitomo*, the Second Circuit has described the exception as follows:

> "Although the bounds of [the manifest disregard of the law] ground have never been defined, it clearly means more than error or misunderstanding [by the arbitrator] with respect to the law. The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term 'disregard' implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it. . . . Judicial inquiry under the "manifest disregard" standard is therefore extremely limited. The governing law alleged to have been ignored by the arbitrators must be well defined, explicit, and clearly applicable.

*Sumitomo Constr. Co.*, 1997 Guam 8 at ¶ 19 (quoting *Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche Int'l, Ltd.*, 888 F.2d 260, 265 (2d Cir. 1989)).

**[47]** Courts agree that "[m]anifest disregard of the law means something more than just an error in the law or a failure on the part of the arbitrators to understand or apply the law." *Luong v. Circuit City Stores, Inc.*, 368 F.3d 1109, 1112 (9th Cir. 2004) (quoting *Mich. Mut. Ins. Co. v. Unigard Sec. Ins. Co.*, 44 F.3d 826, 832 (9th Cir.1995)); *see also Dawahare v. Spencer*, 210 F.3d 666, 669 (6th Cir. 2000) ("An arbitration decision must fly in the face of established legal precedent for us to find manifest disregard of the law.") (quotation marks omitted). "We are not at liberty to set aside an arbitration panel's award because of an arguable difference regarding the meaning or applicability of laws urged upon it." *Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche Int'l, Ltd.*, 888 F.2d 260, 265 (2d Cir. 1989). "An

arbitration panel acts with manifest disregard if (1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle." *Dawahare*, 210 F.3d at 669 (quotation marks omitted). "It must be clear from the record that the arbitrators recognized the applicable law and then ignored it." *Luong*, 368 F.3d at 1112 (quoting *Mich. Mut. Ins. Co. v. Unigard Sec. Ins. Co.*, 44 F.3d 826, 832 (9th Cir.1995)).

**[48]** This court has never explicitly adopted the manifest disregard of the law standard as a proper ground for vacating an arbitration award. Arbitration awards are widely tested against this standard by courts in other jurisdictions, and we herein adopt this standard as a valid basis for vacating an arbitration award in this jurisdiction. We find the manifest disregard ground to fall within the rubric of a statutory ground, section 10(a)(3) of the FAA, which allows a court to vacate an arbitration award "where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or any other misbehavior by which the rights of any party have been prejudiced." 9 U.S.C. § 10(a)(3). An arbitrator that "refuses to hear evidence pertinent and material to the controversy," *id.*, commits the same type of prejudicial misconduct as an arbitrator that is aware of applicable law and consciously refuses to apply the law. In light of the stringent test required to demonstrate a manifest disregard of the law, we hold that an arbitration award made in manifest disregard of the law rises to the level of "misbehavior by which the rights of a[ ] party have been prejudiced" under 9 U.S.C. § 10(a)(3). *Id.*

**[49]** In the present case, the lower court found that the arbitrators disregarded the law by failing to consider the importance of the continuing clause in the parties' contract. This conclusion is not supported by the record. PacifiCare

correctly points out that HIPAA and the continuing clause in the parties' Agreement were presented to the arbitrators for review. Both parties addressed these provisions in relation to the dispute in their arbitration briefs. *See* ER, pp. 303-348 (Arbitration Briefs). Furthermore, it is clear that the arbitrators considered both HIPAA and the continuing clause in the Agreement in rendering their award. The two-paragraph arbitration award explicitly referenced both HIPAA and the "continuing clause." *See* ER, p. 393 (Arbitration Award, October 1, 2003). There is nothing in the record which would suggest that the arbitrators ignored HIPAA or the continuing clause; rather, they were addressed in the award. Without deciding the issue, the most that can be concluded is that the arbitrators erred in interpreting or applying the law. This type of error or misapplication of the law does not amount to a manifest disregard of the law. *See Luong*, 368 F.3d at 1112 (indicating that the arbitrator considered a case (*Toyota)* relevant to the issues, and finding that "without expressing a view one way or the other on whether the arbitrator got *Toyota* right, it is clear that the arbitrator did not *ignore* it. His written decision is part of the petition. Virtually every line of the opinion and award discusses *Toyota* and how it plays out on the facts in Luong's case. That cannot amount to 'manifest disregard of federal law.'").

**[50]** In determining whether an arbitrator manifestly disregarded the law, "[t]he reviewing court should not concern itself with the 'correctness' of an arbitration award. Where the parties have agreed to arbitration, the courts will not review the merits of the dispute." *Thompson v. Tega-Rand Intern.*, 740 F.2d 762, 763 (9th Cir. 1984). Here, the arbitrators clearly interpreted the contract and considered relevant law. Accordingly, we find that the lower court erred in vacating the arbitrators' award on the ground that the arbitrators manifestly disregarded the law.

### b. Essence of the Parties' Agreement

**[51]** In vacating the arbitrators' October 1, 2003 award, the lower court also held that the award violated the "essence" of the parties' Agreement. The court concluded:

> The essence of the agreement between the parties is its continuity and the method it has provided to promote continuity. The very essence of the agreement mandates and demands continuity. When an arbitration award grants termination of the agreement without exploring and deciding the dispute which lead the parties to impasse (disagreement as to benefits and rates), the arbitration award goes against the very essence of the agreement.

ER, vol. II of II, p. 425 (Decision and Order, October 20, 2003, p. 25).

**[52]** Courts have adopted the essence ground, holding that "[a]n arbitration award may be overturned if it does not 'draw its essence' from the contract." *Michigan Mut. Ins. Co. v. Unigard Sec. Ins. Co.*, 44 F.3d 826, 830-31 (9th Cir. 1995) (quoting *Local Joint Exec. Bd. of Las Vegas v. Riverboat Casino, Inc.*, 817 F.2d 524, 527 (9th Cir.1987)). As discussed below, we find that the essence ground does not support vacating the arbitrators' award in this case; thus, we leave open the question of whether the essence test is a proper ground for vacating an award. "[W]e are not presented with the proper justification necessitating our adoption and use of" the essence test. *Sumitomo Constr. Co.*, 1997 Guam 8 at ¶ 20.

**[53]** Courts adopting the essence test have found that in determining whether an arbitration award drew its essence from the contract, the focus is on whether "the arbitrator looked to the words of the contract and to the conduct of the parties." *Michigan Mut.*, 44 F.3d at 831. An award draws its essence from the agreement "so long as the interpretation can in some rational manner be derived from the agreement, 'viewed in the light of its language, its context, and any other indicia of the parties' intention; only where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop, may a reviewing court disturb the award.'" *Amoco Oil Co. v. Oil, Chemical and Atomic Workers Int'l Union, Local 7-1, Inc.*, 548 F.2d 1288, 1294 (7th Cir. 1977) (quoting *Ludwig Honold Manufacturing Co. v. Fletcher*, 405 F.2d 1123, 1128 (3d Cir. 1969)); *see also Executone Info. Sys., Inc.*, 26 F.3d at 1320 ("[W]e must affirm the arbitrator's decision if it is *rationally inferable* from the letter or the purpose of the underlying agreement."). Basically, an award fails to draw its essence from the agreement if it can be said that "the award ignored the plain language of the contract." *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 986-87 (9th Cir. 2001).

**[54]** Furthermore, "[t]he Supreme Court has instructed that 'as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.'" *Jenkins v. Prudential-Bache Sec., Inc.*, 847 F.2d 631, 635 (10th Cir.1988) (quoting *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38, 108 S. Ct. 364, 370-71 (1987)). A court should not disturb "an arbitrator's decision unless it can be said with positive assurance that the contract is not susceptible to the arbitrator's interpretation." *Id.* at 635.

**[55]** The question here is whether the arbitrators construed the parties' Agreement, and whether the Agreement was at all susceptible to the arbitrators' interpretation - namely, that PacifiCare may be relieved of further obligations under the Agreement. Under the plain language of the Agreement, PacifiCare was required to renew the contract. Paragraph 2.1 of the Agreement provided that the contract "shall renew automatically for one year each October 1st unless terminated for major default in availability or quality of services". ER, p. 172, vol. II of II (Agreement, ¶ 2.1). The parties were further required to come to some agreement as to rates and benefits, and that a dispute as to the rates for FY 2004 should be submitted, and therefore decided, by way of arbitration. ER, vol. II of II, pp. 173, 180-81 (Agreement ¶¶ 3.1, 5.1) (setting forth the timeline for negotiating rates); Supplemental Record on Appeal, (Decl. of David A. Mair, Ex. A) (stating that the parties shall submit disputes which were negotiated and not agreed upon to arbitration). Notwithstanding these provisions in the Agreement, we cannot conclude with "positive assurance" that the arbitrators' conclusion to terminate coverage was not "rationally inferable" from the contract. The precise remedy for determining rates where the parties could not agree on rates was not articulated *explicitly* under the Agreement. The terms of the Agreement did not clearly provide that should an impasse be reached as to rates, rates shall be determined by an arbitrator. Such silence on the issue could have led to an inference that should the parties disagree as to rates, and the Government did not wish to accept the rates proposed by PacifiCare after an earnest attempt by the parties to come to an agreement (as was the case here), PacifiCare was not bound to provide continued coverage.[10] Under this

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[10] This conclusion arguably finds support viewing the Agreement in light of the statutes relied upon by the arbitrators, specifically, HIPAA and local law. The Agreement was silent on the remedy for a disagreement as to rates. Furthermore, neither HIPAA nor

interpretation, the arbitrators' decision, while perhaps a misinterpretation of the contract, was not necessarily a complete departure from the essence of the contract. *See Jenkins*, 847 F.2d at 635 ("The arbitrator may not ignore the

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local law offers a remedy in such circumstance. In fact, HIPAA does not address the issue of rates. *See* William F. Highberger, *Material on Health Care Law*, in American Law Institute-American Bar Association Continuing Legal Education, July 23, 1998, Current Developments in Employment Law, *available at* WESTLAW, SD06 ALI-ABA 395, 409 ("HIPAA does not set premium rates but it does prohibit plans and insuers from charging an individual more than similarly situated individuals in the same plan because of health status."); PAUL J. ROUTH, WELFARE BENEITS GUIDE § 3:18, *available at* WESTLAW, WELFAREBG § 3:18 (2004) ("[HIPAA] does not limit the premiums that the insurer can charge the group"); *see also* Greta E. Cowart, *The Never Ending Story*, in American Law Institute-American Bar Association Continuing Legal Education, July 7-11, 2003, Advanced Law of Pensions, Welfare Plans and Deferred Compensation, *available at* WESTLAW, SJ013 ALI-ABA 663, 675 (stating that HIPAA does not "place any limits on the amount an individual may be charged for an individual health insurance policy and an issuer may collect medical information to use it only for determining premiums").

The guaranteed renewal provision in HIPAA is subject to agreement for coverage by the *plan sponsor*, in this case, the Government. *See* 42 U.S.C. § 300gg-12(a) (West, WESTLAW through P.L. 108-295). Under HIPAA, the issuer is only required to renew at the option of the plan sponsor. One plausible conclusion under the facts of this case was that where the health care issuer (PacifiCare) proposes terms for renewal, which is rejected by the sponsor (the Government), then the sponsor has *de facto* rejected the offer and thereby opted against renewal of the coverage. In such circumstance, HIPAA allows for nonrenewal. Such conclusion arguably has some rational basis considering that local law and the parties' Agreement appear to be silent on the remedy to be applied where there is a disagreement as to rates. *See* JEFFREY D. MAMORSKY, HEALTH CARE BENEFITS LAW § 16.03 (2004), found at WESTLAW, HCBL, § 16.03 ("It is up to the states to regulate rates in order to make health coverage affordable. So where price is still a barrier to health coverage, the states will have to provide relief."); Routh, *supra*, § 3:18 ("[E]ven though the insurer is required to accept the small employer, the cost of the coverage can be prohibitively high, at least under [HIPAA]. The real issue is how state law will factor into the equation.").

plain language of the contract, but the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract.").

**[56]** [T]he question for decision by a [ ] court asked to set aside an arbitration award . . . is not whether the arbitrator or arbitrators erred in interpreting the contract; it is not whether they clearly erred in interpreting the contract; it is not whether they grossly erred in interpreting the contract; it is whether they interpreted the contract. If they did, their interpretation is conclusive.

*Hill*, 814 F.2d at 1195 (citations omitted). In the present case, the arbitrators interpreted the parties' Agreement, and their decision was rationally based on the terms of Agreement. Assuming *arguendo* that the essence test was adopted as an appropriate ground for vacating an arbitration award in this jurisdiction, we could not conclude that the award in this case was made contrary to the essence of the parties' Agreement. Accordingly, we hold that the lower court erred in vacating the arbitrators' award on this ground.[11]

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[11] PacifiCare raises several other grounds supporting the arbitrators' award, including the following: (1) the Government breached its contract by unilaterally demanding coverage, violating the procurement law, and unilaterally determining rates and benefits; (2) renewal for FY 2004 was not required because the Government failed to timely pay premiums; (3) the Government cannot compel specific performance of the Agreement; (4) and enforcement of the Agreement is not allowed under the doctrine of "impossibility." These issues have been rendered mot by our holding reversing the lower court's decision has rendered. We therefore find it unnecessary to address these arguments.

## IV.

**[57]** In accordance with the foregoing, we hold that the lower court erred in vacating the arbitrators' October 1, 2003 award. While the lower court was permitted to review whether the arbitrators exceeded their authority, the court was required to give the appropriate deference to the decisions of the arbitrators relating to procedural requirements for issuing the award. The lower court erred in undertaking an independent review of these matters and in concluding that the arbitrators exceeded their authority by addressing the issue of PacifiCare's obligation to continue coverage for FY 2004. Furthermore, the lower court's conclusion that the arbitrators erred as a matter of law on the merits did not support a finding that the arbitration award was made in manifest disregard of the law or contrary to the essence of the parties' Agreement. Accordingly, the lower court's decision vacating the October 1, 2003 arbitration award is hereby **REVERSED**. This matter is remanded for further proceedings consistent with this opinion.

**TORRES, J., Dissenting:**

**[58]** The majority holds that the arbitrators had the authority to determine the issue of PacifiCare's continued obligation to provide coverage under the Agreement for FY 2004. I disagree with this holding for the reasons set forth below, and I therefore respectfully dissent.

**[59]** The lower court in this case determined that the arbitrators exceeded their authority in ruling on the issue of PacifiCare's continued obligation to provide coverage for FY 2004. The court's decision was based on its finding that the arbitrators were not authorized to rule on issues which the

parties did not reach an impasse. The majority's analysis of the lower court's decision focuses on the lower court's determination on the issue of impasse. Specifically, the majority holds that the question of whether the parties reached an impasse on the issue of termination of coverage was a matter for the arbitrators to decide. I agree that the FAA applies to the present dispute, and that principles of interpretation governing cases under the FAA apply here. *Kanazawa, Ltd. v. Sound, Unlimited*, 440 F.2d 1239, 1240 (9th Cir. 1971); *see* 9 U.S.C. § 1 (West, WESTLAW through P.L. 108-295). I also agree that under the applicable law, procedural questions, including whether the parties reached an impasse on a particular issue, are matters for the arbitrators to decide. *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557, 84 S. Ct. 909, 918 (1964). However, as the majority correctly recognizes, arbitrators are only permitted to decide procedural matters related to subjects which are arbitrable in the first place. *Id.* Thus, the issue of whether procedural requirements for arbitration have been met cannot be determined by the arbitrators unless it is first determined that "that the parties are obligated to submit the subject matter of a dispute to arbitration." *Id.*

**[60]** In the present case, the arbitrators' implicit finding that an impasse existed on the issue of termination is immaterial if the question of whether PacifiCare had a continuing obligation to provide coverage when the parties failed to mutually agree on the rates and benefits for FY 2004 was not a subject that the arbitrators had the authority to decide. It is here that my view diverges from that of the majority.

**[61]** It is settled law that the question of whether a dispute is arbitrable is for the court to decide absent "clear and unmistakable" evidence that the parties intended to reserve the question for the arbitrators. *First Options of Chicago,*

*Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 1924 (1995) (quoting *AT&T Techs., Inc. v. Comm. Workers*, 475 U.S. 643, 649, 106 S. Ct. 1415, 1418-19) (brackets omitted); *see Lebanon Chem. Corp. v. United Farmers Plant Food, Inc.*, 179 F.3d 1095, 1100 (8th Cir. 1999) ("Without a clear and unmistakable delegation of the question of arbitrability to an arbitrator, the arbitrability of a dispute must be decided by the courts."). Viewing the parties' Agreement, and specifically the arbitration clause, it is neither clear nor unmistakable that the parties intended for the arbitrators to determine their own authority to decide a particular dispute. *See Carson v. Giant Food, Inc.*, 175 F.3d 325, 330 (4th Cir. 1999) ("[A]rbitration clauses that generally commit all interpretive disputes 'relating to' or 'arising out of' the agreement do not satisfy the clear and unmistakable test."); *McLaughlin Gormley King Co. v. Terminix Int'l Co.*, 105 F.3d 1192, 1194 (8th Cir. 1997) (finding that the contract provision requiring arbitration of "[a]ny controversy arising out of, or relating to this Agreement or any modification or extension hereof" did not "clearly and unmistakably evidence[ ] the parties' intent to give the arbitrator power to determine arbitrability") (alteration in original); *cf. Spahr v. Secco*, 330 F.3d 1266, 1270 (10th Cir. 2003) ("[P]rovisions to arbitrate all disputes arising out of or relating to the overall contract, like the one at issue here, do not provide the requisite clear and unmistakable evidence 'within the four corners of the [a]greement that the parties intended to submit the question of whether an agreement to arbitrate exists to an arbitrator.'") (quoting *Riley Mfg. Co. v. Anchor Glass Container Corp.*, 157 F.3d 775, 780 (10th Cir. 1998)).

**[62]** Whether the parties intended to arbitrate the issue of termination when they could not mutually agree on rates and benefits was therefore a question for the court to decide. *See First Options*, 514 U.S. at 944-45, 115 S. Ct. at 1924. Deciding this question is a matter of contract interpretation.

*See id.*, 514 U.S. at 944, 115 S. Ct. at 1924. In light of the policy favoring arbitration, doubts as to whether a particular issue is arbitrable are to be resolved in favor of arbitration. *See First Options*, 514 U.S. at 943-44, 115 S. Ct. at 1924. However, this policy favoring arbitration cannot override the parties' intent. *See Equal Employment Opportunity Comm'n ("E.E.O.C.") v. Waffle House, Inc.*, 534 U.S. 279, 294, 122 S. Ct. 754, 764 (2002) ("While ambiguities in the language of the agreement should be resolved in favor of arbitration, we do not override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated.") (citing *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 476, 109 S. Ct. 1248, 103 L.Ed.2d 488 (1989)); *Carson*, 175 F.3d at 328-29. The United States Supreme Court has recognized that:

> [T]he FAA does not require parties to arbitrate when they have not agreed to do so, nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement. It simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.

*Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478, 109 S. Ct. 1248, 1255 (1989) (citations omitted). "[T]he purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* 388 U.S. 395, 404 n.12, 87 S. Ct. 1801, 1806 n.12 (1967). Therefore, "[d]espite the public benefits of arbitration, the determination of what disputes are arbitrable is focused on the intent of the parties." *Carson*, 175 F.3d at 328-29; *see also U.S. Titan, Inc. v. Guangzhou Zhen Hua*

*Shipping Co.*, 241 F.3d 135, 146 (2d Cir. 2001) ("Notwithstanding the strong federal policy favoring arbitration as an alternative means of dispute resolution, courts must treat agreements to arbitrate like any other contract.") (citation omitted). Because arbitration is a matter of contract, "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Carson*, 175 F.3d at 328 (quoting *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582, 80 S. Ct. 1347, (1960)) (brackets omitted).

**63]** Balancing the policy favoring arbitration with the [importance of contractual intent, arbitration should be allowed where the arbitration clause is broad without limitations and is properly denied when the parties have contracted to limit the scope of arbitration. Where an arbitration clause is not broad, courts must be sure that the parties contracted to arbitrate the issue at hand. "[A]lthough the Federal Arbitration Act embodies a clear federal policy favoring arbitration agreements, such agreements must not be so broadly construed as to encompass claims that were not intended to be arbitrated under the original contract." *AGCO Corp. v. Anglin*, 216 F.3d 589, 593 (7th Cir. 2000) (citation omitted). After reviewing the parties' Agreement, it is my view that the parties did not intend to arbitrate the issue of termination where the parties could not mutually agree on rates and benefits for FY 2004.

**[64]** "When deciding whether the parties agreed to arbitrate a certain matter . . . , courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." *First Options*, 514 U.S. at 944, 115 S. Ct. at 1924. Guam law provides that, in construing a written contract, the contract language is used to determine the parties' intent. Title 18 GCA § 87105 (1994) ("When a contract is reduced to writing, the intention of the parties is

to be ascertained from the writing alone, if possible . . . ."); *see Ronquillo v. Korea Auto, Fire & Marine Ins. Co.*, 2001 Guam 25, ¶ 10 (stating that "the intent of the parties is ascertained from the writing alone"); Title 18 GCA § 87104 (1994) ("The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."); *Camacho v. Camacho*, 1997 Guam 5, ¶ 33 ("[I]n interpreting a clause of a contract to determine the intent of the contracting parties, whenever possible, the express language of the contract should control.").

**[65]** Here, the arbitrators decided whether PacifiCare could be released from their continuing obligation to provide coverage where the parties did not agree on rates and benefits for FY 2004. PacifiCare argues, and the majority accepts, that the decision releasing PacifiCare from their continuing obligation is appropriate because it stems from a dispute or controversy covered by the arbitration clause. The Government's claim is essentially that it did not contract to arbitrate this grievance -- the release of PacifiCare from their continuing obligation, simply because PacifiCare made an offer that was not accepted. Instead, the parties agreed that the contract would be renewed automatically and PacifiCare had a continuing obligation to provide coverage with the rates to be determined by the arbitrators in the event of an impasse.

**[66]** In discerning the parties' intent on whether the issue of PacifiCare's continued obligation based on a failure to agree on rates and benefits was within the authority of the arbitrators to decide, the starting point is the language of the arbitration clause. Section 1.01 of Attachment III of the Agreement provide "*Any dispute or controversy* between the parties arising under this Agreement shall be submitted to binding arbitration." ER, vol. II of II, p. 215 (Agreement,

Attachment III, § 1.01). While general, the arbitration clause cannot be viewed in a vacuum, and must be considered against other provisions of the contract. *See Yasuda Fire & Marine Ins. Co. v. Weights Enters.*, 1998 Guam 5, ¶ 14 ("Language in a contract must be construed in the context of that instrument as a whole and the circumstances of that case . . . .") (quoting *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1265 9Cal. 1992)). "However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract." Title 18 GCA § 87114 (1994). Thus, we should not read a contract more expansively than what the parties intended, as gleaned from all provisions of the contract. It is the law in this jurisdiction the "[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Title 18 GCA § 87107 (1994).

**[67]** Applying the aforementioned rules of interpretation, I conclude that the arbitration clause in this case cannot be characterized as "broad" in light of other provisions in the parties' Agreement which limit the subject matters and scope of the arbitrators' authority.

**[68]** Sections 1.01.11 and 1.01.24 of Attachment III of the Agreement specifically limit the issues that the arbitrators may rule upon after a dispute has been submitted for their consideration. Section 1.01.11 of Attachment III of the Agreement instructs that the arbitrators' decision must be limited to issues specified in the notice provided in Section 1.01. Similarly, Section 1.01.24 states that, while each party agrees to perform and to fulfill the award or finding concerning the matters submitted to arbitration, the arbitrators are bound by the Agreement. Both sections clearly indicate that the arbitrators cannot rule on "any dispute or controversy" arising under the Agreement as the

arbitration clause would initially suggest. Other provisions of the Agreement further evidence the parties' intent that not all issues will be covered by the arbitration clause. Section 1.01.24 provides that pleadings in any action pending on the same matter submitted to arbitration "shall be deemed amended to limit the issues, if any, to those *not* covered by the arbitration."[12] ER, vol. II of II, p. 220 (Agreement, Attachment III, § 1.01.24) (emphasis added). This section contemplates the existence of issues which are in fact cognizable in a court action and not arbitration. A final limitation is found in Section 2 of Attachment III of the Agreement, where the "parties acknowledge that the revisions to the arbitration procedures . . . do not change the effect of the decision of the District Court of Guam Appellate Division in Civil Case No. 90-00014A on the Agreement."[13] ER, vol. II of II, p. 220 (Agreement,

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[12] The majority suggest that this case does not come within the scope this particular part of Section 1.01.24, when in fact litigation was pending concerning the dispute of PacifiCare's obligation to continue coverage for FY 2004. This appeal arose out of a complaint filed by the Government to compel performance of the automatic renewal provision contained in the Agreement, thus triggering application of Section 1.01.24

[13] The Appellate Division case referred to is *Government of Guam v. FHP, Inc.*, Civ. No. 90-00014A, 1991 WL 275584 (D. Guam App. Div. July 10, 1991). There, the Government challenged the automatic renewal provision, similar to Paragraph 2.1 in this case, in a contract between the Government and PacifiCare's predecessor in interest, FHP, Inc. *Id.* At * 7. The Government alleged that the "automatic annual renewal clauses are effectively perpetual and thus void." *Id.* The Government further alleged that "because the contracts do not state a duration of the automatic annual renewal clauses, the health care service agreements are terminable by GovGuam after a reasonable time." *Id.* The Appellate Division disagreed, approving the lower court's finding that the agreement is "not expressly or impliedly perpetual," but rather, was "automatically renewed subject to written consent." *Id.* The court concluded that "[w]hile the agreements may therefore exist or a very long time, they may e terminated and thus are

Attachment III, § 2). Construing the arbitration clause as broad and unlimited would render these latter two contractual provisions superfluous. To give the latter provisions appropriate significance, they are only rationally interpreted as limiting the scope of the matters which may be resolved by way of arbitration.

**[69]** Because the arbitration clause is limited by other contract provisions, it is not at all clear that the parties intended to arbitrate termination after negotiations fail. If the arbitration clause were in fact broad and unlimited, it could more easily be concluded that any issue related to continued coverage is arbitrable to the extent that the issue arose out of the Agreement and the parties' obligations under the Agreement. However, because the arbitration clause in this Agreement is limited as identified above, it cannot be concluded that the clause necessarily encompasses *any* dispute as to PacifiCare's obligation to continue coverage. Thus, in discerning the intent of the parties, other provisions of the Agreement must be considered.

**[70]** Paragraph 2 of the Agreement clearly provides that the contract shall renew automatically on the first day of the Fiscal Year unless terminated by the Government for major default in the availability or quality of services. Importantly, the Agreement is silent on termination based on an allegation that PacifiCare's offer of rates was not accepted by the Government although the Agreement clearly contemplates termination of PacifiCare's obligation to continue coverage under other specified circumstances.[14]

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not in perpetuity." *Id.* The court ultimately determined that the "automatic annual renewal clause are valid and enforceable." *Id.* At * 11.

**[71]** Considering these aspects of the Agreement, it can only be concluded that the parties did not intend that the issue of PacifiCare's obligation to continue coverage based on failed negotiations was in fact arbitrable.[15] Because the parties clearly meant for coverage to be renewed automatically, it is evident that they intended for the arbitrators to decide only those questions related to aspects of coverage specified under the terms of the Agreement, and not the obligation to offer continued coverage under circumstances not contemplated under the Agreement. By including specific circumstances where termination is allowed, (e.g. for major default in the quality of services or the lack of an appropriation), the arbitrators' authority to decide questions of termination was limited. Such limitation influences the outcome here. Because termination for a failure to negotiate rates was not a circumstance warranting termination under the Agreement, it is apparent that the parties did not intend for this issue to be decided by the arbitrators. To hold otherwise eviscerates the parties' contractual obligations and is in contravention of the Agreement's continuing clause.

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[14] Under Paragraph 2.3, the contract may also be terminated in the event of non-payment due to a failure to appropriate funds. Further, Paragraph 2.2 reserves for PacifiCare the right to suspend performance or terminate membership in the event of nonpayment by subscribers.

[15] Notably, the Agreement is also silent on termination based on a material breach for nonpayment of premiums. PacifiCare asserts that the habitual late payment by the Government is a material breach of the contract and it is well settled law that a material breach excuses the other parties' performance. Section 1.01.11 of Attachment III specifically states that the arbitration award shall be based solely on the issues identified in the notice of issues provided in Section 1.01 of Attachment III. Whether the parties agreed that the arbitrators could decide this issue need not be addressed here because the issue of non-payment was not included in PacifiCare's notice provided in Section 1.01.

[72] This interpretation of the Agreement does not conflict with any recognized policy. Unlike in labor cases, for example, where it is agreed that the arbitrator has specialized knowledge which promotes the use of arbitration as a matter of policy, the arbitration scheme in the present case does not reflect the presence of specialized institutional competence which is more apt in administering the parties' rights under the contract. *See Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368, 377-379, 94 S. Ct. 629, 637 (1974).[16]

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[16] In *Gateway Coal Co. v. United Mineworkers of America*, the United States Supreme Court enunciated the standard in determining whether an issue is arbitrable under a collective-bargaining agreement, stating that "'[a]n order to arbitrate the particular grievance should not e denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.'" *Id.*, 414 U.S. 368, at 378-79, 94 S. Ct. at 632 (quoting *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582—583, 80 S. Ct. 1347, 1353 (1960). The Court further recognized the basis for this liberal standard, stating that

> commercial arbitration and labor arbitration have different objectives. In the former case, arbitration takes the place of litigation, while in the latter "arbitration is the substitute for industrial strife." A collective-bargaining agreement cannot define every minute aspect of the complex and continuing relationship between the parties. Arbitration provides a method for resolving the unforeseen disagreements that inevitably arise. And in resolving such disputes, the labor arbitrator necessarily and appropriately has resort to considerations foreign to the courts:
>
> > The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in

There is nothing that would suggest that the arbitrators have any specialized knowledge which the parties would reasonably expect be accorded special reliance. So, too, there is nothing which would suggest that the parties would expect any different standard to apply in determining whether a particular claim is arbitrable. Thus, like the question of who should decide questions of arbitrability, where the intent of the parties to arbitrate questions of arbitrability must be clear and unmistakable, there is little reason to apply a lesser standard of proof in determining whether the parties agreed that a particular subject matter should be arbitrated. Both inquiries require the same fundamental determination -- that of the parties' intent. The majority seems to suggest that a lesser standard of proof is required to determine whether a particular claim is arbitrable. This manner of interpretation is debatable, for even a pro-arbitration interpretation of the contract cannot override the parties' intent as evidenced in the Agreement.[17]

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> his knowledge of the common law of the shop and their trust in his personal judgment to ring to bear considerations which are not expressed in the contract as criteria for judgment.

*Id.* (quoting *United Steelworkers*, 363 U.S. at 578, 581-82, 80 S.Ct. at 1351-53).

[17] It is particularly appropriate that the court closely scrutinize the parties' intent under the Agreement regarding the scope of the arbitrators' authority to determine issues. This is because the Agreement appears to give one party the unilateral ability to frame the issues presented for arbitration. While it is clear that the notice provided in Section 1.01 cannot alter the contract or the arbitrators' authority under the contract, by allowing one party the ability to specify the issues, an opportunity exists to mingle non-arbitrable issues with arbitrable ones. The availability of this opportunity necessitates a more searching review of whether the issues actually submitted or ruled upon were within the

[73] A judge may vacate an arbitration award if the "arbitrators exceeded their powers." 9 U.S.C. § 10(a)(4) (West, WESTLAW through P.L. 108-295). "An arbitrator exceeds his powers when he acts without subject matter jurisdiction, [or] decides an issue that was not submitted to arbitration . . . ." *Jordan v. Cal. Dep't of Motor Vehicles*, 123 Cal. Rptr. 2d 122, 131 (Ct. App. 2002) (citations omitted). The parties' Agreement in this case must be viewed as a whole, with each provision interpreted in light of each other, so as to give effect to every part, if reasonably practicable. *See* 18 GCA § 87107. When the intent is clear, the court must give effect to that intent.[18] Interpreting the parties' Agreement, it is clear that the Government bargained for the contract to continue each year and did not intend to arbitrate the question of PacifiCare's continued obligation to offer coverage where the parties could not simply agree on rates. Thus, the arbitrators ignored the Agreement's clear contractual limitations regarding their authority. The arbitrators acted on a subject which they had no authority to decide. "Arbitration under the [FAA] is a matter of consent, not coercion . . . ." *Volt Info. Sciences, Inc.*, 489 U.S. at 479, 109 S. Ct. at 1256. To uphold the arbitration award in this case would disregard the principle that "[t]he parties--not the

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arbitrators' authority to decide as evidenced under the Agreement – for it is the Agreement which encompasses the intent of *both* parties.

[18] Even if it is concluded that the question of the arbitrability of PacifiCare's obligation to continue coverage was ambiguous under the terms of the Agreement, such ambiguity must be resolved, as a matter of law, against PacifiCare. Section 87120 of Title 18 of the GCA states that where uncertainty is not removed by the general methods of statutory interpretation, "the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist." Title 18 GCA § 87120 (1992). Furthermore, "[t]he promisor is presumed to be such party; except in a contract between a public officer or body, as such, and a private party, *in which it is presumed that all uncertainty was caused by private party*." *Id.* (emphasis added). Applying this rule of construction, an interpretation favoring the Government must prevail.

courts--control which disputes will be arbitrated." *Carson*, 175 F.3d at 329. For this reason, I respectfully dissent.